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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DESSIE WUBAYEH, DEGETNU T. SHIMEKACH, FRANCIS EFAGENE, SYLVESTER SUBERRO, MELAKU ASMAMAW, VERNON RICHARDS, OWEN GARRISON AND CLETUS AMAGWU, PETITIONERS

v.

THE CITY OF NEW YORK AND REGGIE RIVERA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE DIFFERENCES IN THE CIRCUIT COURTS OF APPEALS IN THE STANDARDS USED TO JUSTIFY A DISMISSAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 41(b) SHOULD BE REVIEWED BY THIS COURT IN ORDER TO ENSURE EQUALITY IN THE ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS.

II. WHETHER THE LESS STRINGENT STANDARDS EMPLOYED BY THE SECOND CIRCUIT TO JUSTIFY A DISMISSAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 41(b), WHICH DIFFER FROM THE MAJORITY OF THE OTHER CIRCUIT COURTS, FAIL TO ADEQUATELY SAFEGUARD THE RIGHT TO A TRIAL.

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F.R.Civ.P. 41(b) ..... *passim*

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit issued an unreported summary order reproduced in the Appendix at 1a-4a. The Court of Appeal's order denying Petitioners Motion for Rehearing and Reconsideration *en banc*, is unreported and is reproduced in the Appendix at 22a.

The order and decision of the United States Court for the Eastern District of New York granting the City of New York's motion to dismiss Petitioners' lawsuit is unreported, and is reproduced in the Appendix at 5a-19a. The District Court's order denying Petitioners' Motion for Rehearing and Reconsideration is unreported and appears in the Appendix at 20a.

JURISDICTION

The Court of Appeals's judgment was entered on April 8, 2009. A timely petition for rehearing and reconsideration *en banc* was denied on June 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

RELEVANT PROVISIONS INVOLVED

Federal Rule of Civil Procedure 41 (b)

> (b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal

> under this subdivision (b) and any dismissal not under this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.

United States Constitution, Amendment V

> "No person shall be...deprived of life, liberty, or property, without due process of law...."

United States Constitution, Amendment VII

> "In suits at common law...the right of trial by jury shall be preserved...."

STATEMENT

Petitioners are immigrants of African and Caribbean descent who worked as livery van drivers in the City of New York, in the county of Queens, in a remote area known as Far Rockaway. (One Petitioner is the wife of a driver who brought a consortium action). The defendants are the City of New York and a New York City police officer, named Reggie Rivera, who patrolled the area where Petitioners worked. A Civil Rights action was brought jointly by Petitioners alleging separate acts by Rivera, on separate occasions. Petitioners alleged that Rivera had used his authority to stop their vehicles and had forced them to drive to desolate locations, where he assaulted and sodomized them.

Prior to bringing the action, the Petitioners filed complaints with New York City's Civilian Complaint

Review Board, who in turn referred the complaints to the office of the District Attorney of Queens County. The District Attorney's office conducted an investigation using law enforcement personnel, and issued a report declining to bring criminal charges against the police officer, and accusing the Petitioners of fabrication. The Petitioners brought their Civil Rights action in the United States District Court for the Eastern District of New York against Rivera and the City of New York under 42 U.S.C. § 1983. The Petitioners contended that the District Attorney's investigation was flawed by a bias in favor of their fellow local law enforcement officer.

The case was prosecuted at length in the District Court. Both Defendants were represented by the same counsel, as were all the Petitioners. The parties engaged in extensive discovery, including motions by Petitioners to compel discovery, exchanges of voluminous documents, and the use of interrogatories. Depositions were taken of Police Officer Rivera, and of the defendants' chief investigating police officer. A deposition was also taken of the defendants' expert witness, a psychologist who had conducted numerous written tests of the plaintiffs. Lengthy depositions were taken of all of the plaintiffs. With discovery completed, and the case having reached the stage of readiness for trial, the parties were about to file a joint pretrial order, when defendant Rivera suddenly filed for bankruptcy, automatically staying the proceedings in the District Court.

With the action stayed in the District Court, counsel for the Petitioners proceeded into Bankruptcy Court, commencing an adversary proceeding under 11

U.S.C. § 523, to prevent any recovery from the Civil Rights case from being discharged. Petitioners' counsel obtained an order from the Bankruptcy Court lifting the stay; and went back to the District Court, and formally requested that the District Court schedule a trial date for the Civil Rights case. The District Court never responded to the plaintiffs' counsel's request to have a trial schedule set, leaving the District Court case in a state of limbo.

After 12 appearances in the Bankruptcy Court, Petitioners' counsel obtained a ruling that Rivera would be denied a discharge. However, as a result of the closing of counsel's local post office following the fall of the World Trade Center towers, mailings from the Bankruptcy Court were not delivered, resulting in a ruling in the Bankruptcy Court that discharged Police Officer Rivera from any debt arising from the Civil Rights case. Plaintiffs' counsel returned to the Bankruptcy Court and obtained a reversal of the Court's discharge. During the long periods of time expended in the Bankruptcy Court, plaintiffs' request for the trial to be scheduled in the District Court remained without action by the District Court.

In 2004, Petitioners' counsel, suffered a complete tear of the rotator cuff in his right shoulder. Being right handed, his ability to work was impaired, and he had to undergo surgery on his right shoulder, followed by a protracted period in which the use of his dominant right arm and hand was limited. During this same period, counsel's chronic back condition worsened, requiring him to undergo surgery in 2006.

Despite the lengthy accumulation of time expended in the Bankruptcy court and the inaction of the District Court on Petitioners' counsels' request for a trial date, Petitioners' counsel initiated further action in the District Court by serving on the defense counsel numerous requests for it to submit its portion of the joint pretrial order. This was met with inaction and the defense counsel's refusal to go forward. Petitioner filed a request with the District Court for it to order the Defense to submit its portion of the pretrial order and obtained such an order. Instead of complying with that order, the defense sought to move to dismiss the case on the grounds of delay. At that time, defense counsel, for the first time, informed plaintiffs and the Court that their client, Police officer Rivera, had died years previously from a medical condition at the age of 43, prior to any alleged period of delay.

In its motion to dismiss, the defense claimed actual prejudice because Rivera had died, albeit before any alleged period of delay could have occurred, but it claimed that the attorneys employed by the defense who had personally handled the case and met with Rivera were no longer employed by them. This claim proved to be false, as the attorneys were shown to be still in the defense's employ. The defense also claimed prejudice because the chief investigating officer was not at his former address and could not be located. This claim also proved to be totally false.

The defense argued further that the passage of time would necessarily diminish the memories of the investigating officer witness and the psychologist witness who had conducted the tests on the plaintiffs. This claim was made despite the fact that these

witnesses, were not eyewitnesses, but rather witnesses who would normally rely on their written reports for their testimony. In addition, both had given depositions, as had Rivera.

The District Court granted the motion. In its memorandum dismissing Petitioners' claims, the District Court cited the Second Circuit's five factor test as outlined in *United States ex rel. Drake v. Norden Systems, Inc.*, 375 F.3d 248, 254 (2d Cir. 2004), which calls for the consideration of: (1) whether the failure to prosecute caused a delay of significant duration; (2) whether the plaintiff was given notice that further delay would result in dismissal; (3) whether the defendant was likely to be prejudiced by further delay; (4) the need to alleviate court calendar congestions balanced against plaintiff's right to an opportunity for a day in court; and (5) whether lesser sanctions would be a more appropriate remedy than dismissal. (11a-12a).

The District Court also held that it could consider the merits of the suit in deciding whether to dismiss for failure to prosecute, and expressed its opinion that the suit had no merit and should be removed from his calendar. (12a) The District Court alluded to an a hearing regarding the identity of a peripheral individual, but it had never heard any testimony from any of the Plaintiffs, nor from Rivera, nor any testimony regarding the merits of the case. The District Court also held that it could presume prejudice from the length of the delay alone. The District Court stated its assumption that the defense's investigator and psychologist witnesses' recollections would probably have been affected by the passage of time. This assumption was utilized by the Court

despite the fact that these witnesses were not eyewitnesses, and that such professionals seldom, if ever, testify from personal recollection. The expert psychologist's trial testimony would concern the psychological tests that she had administered, the records of which were available to her, as was her deposition testimony. Similarly, the investigator had available to him the full panoply of his reports, as well as the deposition he had given. The Court did not hold a hearing on these issues.

A motion for reconsideration was made arguing that the defense should be estopped from claiming prejudice from delays related to litigation in the Bankruptcy Court because Rivera had initiated the bankruptcy to stop the trial from being held; and the defense had never objected to Rivera's foray into Bankruptcy Court; and had never objected to any delay during the periods of time that it now claimed prejudiced them. The motion was denied.(20a)

The Second Circuit Court of Appeals, in a terse summary order that omitted many of the facts, refused to overturn the District Court's decision or remand for an evidentiary hearing.

The Second Circuit Court of Appeals acknowledged that Petitioners had not been given any notice warning of a possible dismissal, and that Petitioners were displaying diligence when the District Court dismissed the lawsuit. The Court of Appeals nevertheless maintained that the District Court had discretion of "wide latitude" in deciding whether to dismiss under Rule 41(b). The Second Circuit asserted that its review was limited to examining the five factors

considered by the District Court against the framework of the "wide latitude" of discretion afforded the District Court. Under the standards used by the Second Circuit, considerations such as lack of notice, and the fact that the plaintiffs' counsel was being diligent when the Court dismissed the case, were of small consequence in view of the wide latitude of discretion afforded the District Court. (3a-4a) The Second Circuit Court of Appeals also asserted that the District Court was entitled to presume prejudice as a matter of law, and that in view of the wide latitude of discretion conferred upon the District Court, it "did not clearly err."

REASONS FOR GRANTING THE PETITION

THE STANDARDS USED BY THE SECOND CIRCUIT COURT OF APPEALS TO JUSTIFY A DISMISSAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 41(b) SHARPLY DIFFER FROM THOSE RELIED UPON IN THE MAJORITY OF THE OTHER FEDERAL CIRCUIT COURTS OF APPEAL, ESPECIALLY THE FIFTH, SIXTH, SEVENTH, EIGHTH, NINTH AND ELEVENTH CIRCUITS, AND FAIL TO ADEQUATELY SAFEGUARD THE FUNDAMENTAL RIGHT TO A TRIAL.

A dismissal under Federal Rule of Civil Procedure 41(b) deprives a party of a trial. The fundamental right to a trial in the federal courts is conferred by the Fifth and Seventh Amendments to the Constitution. Therefore, it is universally recognized in our system, as the Second Circuit concedes, that a Rule 41(b) dismissal is "one of the harshest sanctions at a

trial court's disposal, since it usually extinguishes the plaintiff's cause of action and denies plaintiff his day in court" *Drake v. Norden Sys., Inc.* 375 F.3d 248, 251 (2d Cir. 2004).

Consequently, in the majority of the circuits, the federal appellate courts have sought to limit Federal Rule of Civil Procedure 41(b) dismissals to cases where the delay in prosecution resulted from *contumacious behavior* on the part of counsel or the plaintiff, and when no lesser sanctions are feasible.

The Second Circuit's approach differs substantially from the approach in the majority of the other circuits. The Second Circuit permits a dismissal in the absence of, and without consideration of, whether there was contumacious or bad faith conduct. Such an approach presents a geographical disparity in the dispensation of justice, such that a plaintiff's right to a trial is subject to unequal treatment among the circuits.

The Different Standards used by the Second Circuit in Comparison to the Other Circuits

The Second Circuit's review of Federal Rule of Civil Procedure 41(b) dismissals employs the use of a group of five factors, viewed against the backdrop of the "wide latitude" of discretion, attributed to the District Court, as set forth in its decision. The Second Circuit standards, however, do not rise to the kind of stringent standards exacted in the other Circuits before a case can be dismissed under Rule 41(b).

The standards used by the Second Circuit to justify a dismissal under Rule 41(b) sharply differ from

those relied upon by the other Circuits, especially in the Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits.

Analyzed below are four categories in which the standards used in these circuits differ from the Second Circuit:

1. The Differences in the Circuits on the issue of Contumacious Conduct;

2. The Differences in the Circuits on the issue of whether a dismissal is justified when plaintiff is Currently Displaying Diligence;

3. The Differences in the Circuit Courts on the issue of whether Notice was given by the Court;

4. Differences in the consideration of the periods of delay caused by the Defendant, or by the Court.

1. *The Differences in the Circuits on the issue of Contumacious Conduct:*

A prerequisite for dismissal in most of the other Circuits, and the principal focus of the majority of the Circuit Courts in reviewing a Rule 41(b) motion, is the consideration of whether the conduct of the plaintiff or its counsel was "contumacious" or acting in "bad faith." The decisions from the Fourth, Seventh, and Eleventh Circuits indicate that those Circuits will not sustain the a dismissal in the absence of contumacious conduct or

deliberate delay. In contrast, the Second Circuit can dismiss a case in the absence of contumacious conduct and with no consideration of this issue, as was done in the instant case.

In the instant case, there are no instances of contumacious conduct by the plaintiffs or their counsel, nor were there any allegations that the plaintiffs or their counsel ever disobeyed a Court Order, or failed to respond to the Court's requests, or ever failed to appear, or ever failed to follow the Court's schedule. In fact, it was the Court that failed to respond when plaintiffs' counsel filed a request for the Court to schedule the trial.

In sharp contrast to the Second Circuit's lack of consideration of the absence of contumacious conduct, the Fifth Circuit, has emphasized repeatedly that the absence of contumacious conduct virtually *precludes* a dismissal under Federal Rule of Civil Procedure 41(b). "[I]t is not a party's negligence -- regardless of how careless, inconsiderate, or understandably exasperating -- that makes conduct contumacious; instead, instead, it is the stubborn resistance to authority that justifies a dismissal with prejudice." *Stearman v. CIR*, 436 F.3d 533, 537 (5th Cir. 2006), *citing* Johnson v. Louisiana, 828 F.2d 1129, 1131 (5th Cir. 1987). *See also McNeal* v. *Papasan*, 842, F2d 787, 790 (5th Cir. 1982); *Rogers v. Kroger, Co.* 669 F.2d 317, 320 (5th Cir. 1982) (5th Cir. 1982)(dismissal "is to be used only when the plaintiff's conduct has threatened the integrity of the judicial process [in a way which] leave[es] the court no choice but to deny that plaintiff its benefits").(Emphasis supplied).

In the Fifth Circuit, even when a plaintiff's failure to expeditiously prosecute his or her lawsuit can be fairly characterized as intentional, willful or bad faith conduct, the conduct must be especially egregious and lesser sanctions must be unavailable before imposing the drastic, final and irreparable sanction of dismissal. This was noted in *McNeal, supra,* 842 F.2d at 793, "even with a clear record of delay or contumacious conduct, a district court cannot impose the sanction of dismissal without prejudice for failure to prosecute unless the court first finds that a lesser sanction would not have served the interests of justice." *McNeal,* 842 F.2d at 793.

The decisions from the Fourth, Seventh, and Eleventh Circuits also indicate that those Circuits will not sustain the sanction of dismissal in the absence of contumacious conduct or deliberate delay. *Herbert v. Saffell,* 877 F.2d 267, 270 (4th Cir. 1989) (dismissal requires "the existence of a 'drawn out history of deliberately proceeding in a dilatory fashion'); *Lowe v. City of East Chicago,* 897 F.2d 272, 274 (7th Cir. 1990) ("district court should consider less severe sanctions than dismissal for a party's noncompliance with court orders or failure to prosecute his or her claim expeditiously, unless 'there exists a clear record of delay or contumacious conduct or when less drastic sanctions have proven ineffective."); *Cohen v. Carnival Cruise Lines, Inc.,* 782 F.2d 923, 925 (11th Cir. 1986) (reversing an order of dismissal because proceedings below did not indicate "contumacious delay").

In a similar vein, the Sixth Circuit has observed, "In order to consider a plaintiff culpable, his conduct 'must display either an intent to thwart judicial

proceedings or a reckless disregard for effect of [his] conduct on those proceedings.'" *Mulbah v. Detroit Board of Education*, 261 F.3d 586, 591 (6th Cir. 2001), *citing Shepard Claims Serv. v. William Darrah, & Assocs.*, 796 F.2d 190, 194 (6th Cir. 1986). *See also Knoll v. American Telephone & Telegraph Co.*, 176 F.3d 359, 363 (6th Cir. 1999).

In a no less rigorous approach, the Eighth Circuit employs a balancing test that "focuses foremost upon the degree of egregious conduct which prompted the order of dismissal and to a lesser extent upon the adverse impact of such conduct upon both the defendant and the administration of justice . . . " *Smith v. Gold Dust Casino*, 526 F.3d 402, 405 (8thCir. 2008), citing *Rodgers v. The Curators of the University of Mo.*, 135 F.3d 1216, 1219 (8th Cir. 1998).

The Third and Tenth Circuits explicitly list plaintiff's culpability in the multi-factor analysis each uses to review a dismissal under Rule 41 (b). *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984) (whether dilatory conduct or delay was willful or in bad faith); *Ecclesiastes 9:10-11-12, Inc. v. LMH Holding Co.*, 497 F.3d 1135, 1143 (10th Cir. 2007) (listing as one of five factors "litigant's culpability").

2. *The Differences in the Circuits on the issue of whether a dismissal is justified when plaintiff is Currently Displaying Diligence.*

In the Seventh and Ninth Circuits, as contrasted with the Second Circuit, a case cannot be dismissed under Federal Rule of Civil Procedure 41(b), despite an earlier lack of diligence, if counsel is currently

displaying diligence. *GCIU Employer Retirement Fund, v. Chicago Tribune Company*, 8 F.3d 1195 (7th Cir.1993); *Marks v. San Francisco Real Estate Board*, 627 F.2d 947, 948 (9th Cir. 1990). These cases hold that "an earlier lack of diligence is not grounds for dismissal when the plaintiff is currently displaying diligence." *GCIU Employer Retirement Fund v. Chicago Tribune Co.*, 8 F.3d at 1201; *Marks v. San Francisco Real Estate Bd.*, 627 F.2d at 948. See also *Appelbaum v. Ceres Land Co.*, 546 F.Supp. 17, 21-22 (D. Minn. 1981) (it would be inappropriate to dismiss for failure to prosecute at a time when the plaintiff is prosecuting the claim with diligence), aff'd, 687 F.2d 261 (8th Cir. 1982).

The Second Circuit decision in this case explicitly stated that the Petitioner-Plaintiffs "were displaying diligence at the time the district court dismissed their action" (Appendix 3a) but nevertheless it affirmed the dismissal of the District Court.

The standards used by the Second Circuit and its decision in this case are clearly in conflict with decisions of the Seventh and Ninth Circuit Courts of Appeals.

3. The Differences in the Circuit Courts on the issue of whether Notice was given by the Court

The Second Circuit opinion conceded that there was no notice given by the Court to the plaintiff warning that any further delay could result in a dismissal (Appendix 3a-4a).

The Second Circuit, while recognizing notice as one of the factors that should be considered on a Rule 41(b) motion, in effect, treats lack of notice as an

inconsequential factor, deferring instead to its standard of the District Court judge's "wide latitude" in the application of its discretion when dismissing a case under Rule 41(b).

In contrast, the Seventh Circuit has repeatedly held that an explicit notice to the plaintiff should be given by the Court before a plaintiff's case can be dismissed for lack of prosecution. Gabriel v Hamlin, Doerr Wisely Ruiz and Wexford Health Sources, Inc, 514 F3d 734 (7th Cir. 2008):

> "Further, we have repeatedly held that a district court ordinarily may not dismiss a case for want of prosecution without first providing an explicit warning to the plaintiff." *Sharif v. Wellness Intern. Network, Ltd.*, 376 F.3d 720, 725 (7th Cir. 2004); *see also Ball v. City of Chicago*, 2 F.3d 752, 760 (7th Cir. 1993)"

It is recognized that in *Link v. Wabash Railroad Company*, 370 U.S. 626, 82 S. Ct. 1386 (1962), this Court, in a sharply divided decision, held that the absence of express notice prior to dismissal does not automatically establish a denial of due process (In the dissent this Court stated that: "The plaintiff's cause of action is valuable property...entitled to the protections of the Constitution. Due process requires that property shall not be taken away without notice and hearing." *Link v. Wabash R. Co.* 370 U.S. at 646, 82 S.Ct. at 1397).

In the 47 years since the *Link* decision, the Seventh Circuit, has chosen to view the requirement that notice precede a dismissal under Rule 41(b) as a means of imposing limits upon a district judge's

discretion in order to place boundaries on its power to dismiss a case without a trial. *Ball v. Chicago*, 2 F.3d 752, 756 (7th Cir. 1993).

4. *Differences in the consideration of the periods of delay caused by the Defendant, or by the Court.*

In contrast to the Second Circuit, other federal appellate courts can consider the delays caused by the defendant. In this case, the major delay was initiated by the defendant Rivera, by filing for a bankruptcy to automatically stay the District Court case, as the trial loomed imminent. Rivera was represented by the same counsel as the co-defendant, but the defense attorneys never sought to intervene in the Bankruptcy Court. Nor did the defense ever object to the delay, nor move to dismiss in the District Court during the period of time that they later claimed prejudiced them; that is, not until the trial again loomed as imminent. The defense was content to sit back and accept the delay initiated by its client's dilatory strategy. Moreover, the defense attorneys never informed the Court of the death of Rivera or its imminency, during any of the period of time that they later claimed was prejudicial to them. That disclosure was only made by the defense when again the trial loomed as imminent.

In *Markwell v. County of Bexar*, 878 F.2d 899, 902 (5th Cir. 1989) the court held that it was not error to deny a dismissal motion when delay was partially attributable to the defendant. In the 5th Circuit cases of *United States v. Inter-American Shipping Corp.*, 455 F.2d 938, 939, n. 3 (5th Cir. 1972) the Court said: "It is difficult to understand how the defendant's failure...could constitute contumacious conduct on the

part of the plaintiff." *In McNeal v. Papasan*, 842 F.2d at 794, the court reversed a dismissal and remanded for further findings when, *inter alia*, delay was caused in part by the defendant. The delay on the part of the defendants in the present case is totally ignored as a factor in the Second Circuit analysis.

Additionally, the District Court's failure to respond to the plaintiff's written request for the scheduling of a trial put the case in a state of delayed limbo. This was not considered to be a factor under the Second Circuit analysis.

The more stringent standards used by the courts in the Circuits, other than the Second Circuit, serve to more carefully safeguard a party's right to a trial.

As Petitioners' case shows, the absence of a requirement that a Rule 41 (b) dismissal be premised upon delay attributable to contumacious or bad faith conduct; and the minimization of lack of notice, and the diligence the plaintiffs are demonstrating at the time of a motion to dismiss, leaves a District Court with such a "wide latitude" of power to permanently extinguish a party's right to have its day in court, that the Second Circuit standards that do not adequately safeguard the fundamental right to a trial. Not only did the Second Circuit's summary order attribute no bad faith or contumacious behavior to Petitioners' counsel, the decision of the Second Circuit concedes that plaintiff's counsel was proceeding diligently at the time the defendant moved to dismiss, and that the court had never given plaintiff's counsel any notice of the possibility of dismissal. Moreover, according to the Second Circuit's summary order, the delay need not

even cause actual prejudice to be subject to dismissal because prejudice can be presumed. Furthermore, no hearing need be held on the issue. When one considers that in this case, all pre-trial matters had been concluded, and that all that remained was for a trial to be held, the drastic remedy of dismissal was fundamentally unfair to the plaintiffs who sought to have their day in court. Accordingly, the decision below should be reversed.

The Second circuit's "wide latitude" standard for Rule 41 (b) dismissals bestows upon individual District Court judges almost unlimited power to extinguish a litigant's fundamental right to a trial without the safeguards used by the other Circuits. Considering the gravity of a final dismissal under Rule 41(b), it is submitted that the more stringent standards of the other Circuits are more appropriate to ensure the safeguarding of fundamental rights. The use of such standards in the Second Circuit will also serve to ensure the uniformity of the law in the federal courts.

The Second Circuit's approach is not only error, but a departure from the Federal Rule of Civil Procedure 41(b) analyses used in most other federal appellate courts jurisdictions. Accordingly, this Court should issue a writ certiorari to review the judgment below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,
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(any footnotes trail end of each document)

No. 07-4413-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dessie Wubayeh, Degetnu T. Shimekach, Francis Efagene, Sylvester Suberro, Melaku Asmamaw, Vernon Richards, Owen Garrison and Cletus Amagwu, Plaintiffs-Appellants,

v.

The City of New York and Reggie Rivera, Defendants-Appellees.

April 8, 2009, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

JUDGES: Present: HON. CHESTER J. STRAUB, HON. SONIA SOTOMAYOR, Circuit Judges. *

SUMMARY ORDER

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the United States District Court for the Eastern District of New York (Trager, J.) is AFFIRMED.

Plaintiffs-appellants appeal from the judgment of the district court dismissing this action for failure to

prosecute pursuant to Federal Rule of Civil Procedure 41(b), and from the district court's denial of their motion for reconsideration. We assume the parties' familiarity with the underlying facts and procedural history of this case, as well as with the issues on appeal.

We review the district court's decision for abuse of discretion and examine whether: (1) the plaintiffs' failure to prosecute caused a delay of significant duration; (2) the plaintiffs were given notice that further delay would result in dismissal; (3) the defendants were likely to be prejudiced by further delay; (4) the district court carefully balanced the need to alleviate court calendar congestion against the plaintiffs' right to an opportunity for a day in court; and (5) the district court adequately assessed the efficacy of lesser sanctions. *See United States ex rel. Drake v. Norden Sys., Inc.* 375 F.3d 248, 254 (2d Cir. 2004). No one factor is dispositive, and having carefully considered the record as a whole we conclude that the district court did not abuse its discretion in dismissing this case. *See id.*

In dismissing this action, the district court emphasized the plaintiffs-appellants' unreasonable delay and the resulting prejudice to the defendants. The district court did not clearly err in making these findings. *See id.* (stating that a district court abuses its discretion if its decision was based on a clearly erroneous finding of fact). The evidence supports the district court's finding that the plaintiffs took no action in this suit for more than four years. Although this suit became subject to a bankruptcy court stay in September 1999 after defendant Rivera filed a Chapter 7 bankruptcy petition, the bankruptcy court lifted the stay in May 2000 and

the district court reopened this suit on April 23, 2001. There is no evidence that the plaintiffs-appellants took any action in this suit between June 29, 2001 and December 1, 2005, a period of more than four years. Although the plaintiffs-appellants continued to participate in proceedings before the bankruptcy court regarding the dischargeability of defendant Rivera's debt to them until April 13, 2004, the district court did not clearly err in concluding that many of the delays before the bankruptcy court were the plaintiffs-appellants' own fault. Moreover, after the bankruptcy proceedings were completed in April 2004, the plaintiffs-appellants continued to fail to prosecute this action for an additional nineteen and a half months.

With respect to prejudice, the district court correctly held that prejudice resulting from unreasonable delay can be "presumed as a matter of law." *Peart v. City of New York*, 992 F.2d 458, 462 (2d Cir. 1993). Although this presumption is rebuttable, *Drake*, 375 F.3d at 257, the district court did not clearly err in concluding that the plaintiffs-appellants had failed to submit evidence overcoming this presumption, particularly in light of the inevitable fading of witnesses' memories over a long period of delay. Moreover, the plaintiffs-appellants have waived the argument that the district court should have held an evidentiary hearing before making any findings, because they failed to request such a hearing prior to the district court's ruling. *Id.* at 256.

Although the plaintiffs-appellants point to numerous countervailing considerations under the applicable factors, including (1) that they were displaying diligence at the time the district court dismissed their action, and (2) that they never received notice that

further delays would result in dismissal of their action, our case law is clear that a judge enjoys "wide latitude" in determining whether to dismiss an action under Rule 41(b), *Peart*, 992 F.2d at 461 (internal quotation marks omitted), and that no single factor is dispositive, *Drake*, 375 F.3d at 254. Given the district court's findings regarding the plaintiffs-appellants' long period of delay in prosecution and the resulting prejudice to the defendants, we conclude that it acted within its discretion in concluding that dismissal was warranted.

For the foregoing reasons, we AFFIRM the judgment of the district court.

Footnote(s)

*The Honorable Debra Ann Livingston recused herself prior to oral argument. Because the remaining members of the panel are in agreement, we decide this case in accordance with Second Circuit Interim Local Rule § 0.14(b).

Civil Action No. CV-94-0404 (DGT)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

DESSIE WUBAYEH, DEGETNU T. SHIMEKACH, FRANCIS EFAGENE, SYLVESTER SUBERRO, VERNON RICHARDS, MELAKU ASAMAW, OWEN GARRISON and CLETUS AMAGWU,
Plaintiffs,

-against-

THE CITY OF NEW YORK and REGGIE RIVERA,
Defendants.

September 18, 2007, Decided
September 18, 2007, Filed

MEMORANDUM AND ORDER

Trager, J:

Defendant City of New York ("City") has filed a motion to dismiss the above action for failure to prosecute, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. For the following reasons, defendant's motion to dismiss is granted. [1] In addition, although this motion was only brought by the City, this matter will be dismissed as to all defendants, pursuant to a district court's "power to dismiss for failure to prosecute sua sponte." *Martens v. Thomann*, 273 F.3d 159, 179 (2d Cir. 2001).

Background

Plaintiffs Dessie Wubayeh, Degetnu T. Shimekach, Francis Efagene, Sylvester Suberro, Vernon Richards, Melaku Asmamaw, Owen Garrison and Cletus Amagwu (collectively "plaintiffs") filed the initial sealed complaint in this action on January 28, 1994. Plaintiffs brought this civil rights action under 42 U.S.C. § 1983, alleging that defendant Reggie Rivera ("Rivera"), an officer with the New York City Police Department ("NYPD"), violated their constitutional rights by committing unlawful violent assaults and sexual abuse against them. See Second Verified Amended Complaint, dated April 17, 1995. Plaintiffs are each seeking in excess of $ 20 million in punitive and compensatory damages from the City and Rivera. Id.

(1) Initial Investigation and Litigation

In 1994, the Queens County District Attorney's Office conducted an extensive investigation into the allegations of sexual assault by Officer Rivera. See Office of the Queens County District Attorney, Investigation Into Allegations of Sexual Assault by Police Officer Reggie Rivera, dated Dec. 15, 1994 ("DA Report"), attached as Exhibit A to Declaration of Seth D. Eichenholtz, dated Sept. 11, 2006. The District Attorney's 146-page report (which was based on "hundreds" of interviews with the parties involved, review of all the available evidence, scrutiny of Officer Rivera's personal and professional history, and analysis by experts in sexual assault) found that there was no credible evidence to support the plaintiffs' allegations. DA Report at 1-7. Based on this investigation, the City declined to file any criminal charges against Officer Rivera.

The District Attorney's report also raised the "specter of fabrication" in the claims of the plaintiffs against Officer Rivera:

> [E]ach of the alleged victims has a motive to falsely accuse the officer. Each earns his living illegally, employed in one capacity or another in the illegal livery van industry. The accused officer has played an active and aggressive role in the police crackdown on this illegal industry. He has issued thousands of summonses, seized numerous vans and made dozens of arrests. A number of the alleged victims and their witnesses have been at the receiving end of the accused officer's efforts. One was even arrested by him shortly before the first of the allegations was made. The depth of the alleged victims' anger toward the accused officer was such that a meeting was organized by one of the alleged victims prior to the first reported alleged attack, the sole purpose of which was to drive the officer out of the Rockaways by filing false complaints against him. This detail, standing alone, raises the specter of fabrication in this case.

DA Report at 5-6.

Plaintiffs have submitted a lengthy rebuttal to the District Attorney's report. See Plaintiff's Memo of Law in Opposition to Motion to Dismiss Under Rule 41(b) of the Federal Rule of Civil Procedure, dated Oct. 16, 2006 ("Pl.'s Opp.") at Ex. B. Plaintiffs' rebuttal is unsigned and undated, but it is reportedly the "internal work product of plaintiffs' prior attorneys." Pl.'s Opp. at 1.

As the lengthy docket sheet for this case shows, the parties to this dispute engaged in discovery until October 1998. The parties also engaged in expert discovery and disclosure in preparation for trial. After the conclusion of discovery, Magistrate Judge Roanne L. Mann set a schedule for the parties' respective obligations for a pre-trial order, which was due to be submitted to the court by November 1, 1999. See Scheduling Order of Magistrate Judge Mann, filed August 5, 1999. This pre-trial schedule was interrupted when defendant Rivera filed a petition for Chapter 7 bankruptcy on September 1, 1999, prompting an automatic stay of this suit. Pursuant to an order dated September 17, 1999, this suit was stayed and administratively closed pending the disposition of Officer Rivera's bankruptcy petition.

(2) Bankruptcy Court Proceedings

Defendant Reggie Rivera's Chapter 7 bankruptcy petition was overseen by Judge Dorothy Eisenberg of the Eastern District of New York (Central Islip) Bankruptcy Court. See Docket for Bankruptcy Petition # 8-99-87476-DTE. Plaintiffs participated as creditors in the Rivera bankruptcy with two separate series of actions: an adversary proceeding contesting the discharge of Rivera's debt to plaintiffs, and a separate motion seeking to lift the automatic stay against plaintiffs' civil suit.

a. Adversary Proceeding in Bankruptcy Court

On November 9, 1999, plaintiffs initiated an adversary proceeding in bankruptcy court under 11 U.S.C. § 523, seeking to declare that the debt owed by Rivera to the

plaintiffs would not be discharged by the Chapter 7 bankruptcy. See Docket for Adversary Proceeding # 8-99-08489-DTE. After Rivera failed to respond to a summons that was served on November 15, 1999, plaintiffs filed a motion for default judgment on March 1, 2000. After a series of hearings on this motion were adjourned, to permit Rivera to appear and answer, plaintiffs' motion for default judgment was granted by the bankruptcy court after a hearing on December 11, 2001, subject to the court's instructions to plaintiffs to "settle an order" pursuant to the E.D.N.Y. Bankruptcy Court's Local Rule 9072-1.

Because the plaintiffs failed to follow the court's instructions to file a proposed order, the bankruptcy court was unable to enter a final default judgment in the plaintiffs' adversary proceeding at that time. Instead, the bankruptcy court issued a notice of proposed dismissal to the plaintiffs on March 20, 2002. Plaintiffs failed to respond to this notice. The bankruptcy court therefore dismissed the plaintiffs' motion for default judgment on April 1, 2002.

By the admission of plaintiffs' counsel, plaintiffs' "attempts to restore the non-dischargeability status in the case met with difficulty and little success in unraveling the issue" until "counsel retained specialist bankruptcy counsel" in 2004. Pl.'s Opp. at 6. Finally, on April 13, 2004, Bankruptcy Court Judge Eisenberg issued an order reopening the adversary hearing and ordering that "the Debtor-Defendant's debt to the Plaintiffs is not dischargeable under Section 523(a)(6) of the United States Bankruptcy Code." Pl.'s Opp. Ex. I.

b. Lifting of the Automatic Stay

Parallel to the plaintiffs' adversary hearing over the dischargeability of Rivera's debt, the plaintiffs also filed a motion in bankruptcy court on April 3, 2000 seeking relief from the automatic stay of this civil suit. On April 27, 2000, the bankruptcy court held a hearing on this motion, and granted the motion subject to the requirement that plaintiffs submit a final order. On May 18, 2000, Bankruptcy Court Judge Eisenberg issued a final order lifting the stay of the current civil action.

On February 21, 2001, plaintiffs submitted a letter informing this Court that the bankruptcy stay had been lifted and asking the court to return the current action to the calendar. Pl.'s Opp. Ex. G. The request to reopen this case was granted on April 23, 2001. Plaintiffs then submitted a letter dated June 29, 2001 to Magistrate Judge Mann, stating that discovery was complete and requesting a schedule for trial in this case. Pl.'s Opp. Ex. H. The record does not show any further action by Judge Mann, and according to plaintiffs' counsel, "[n]o action was taken by the Court with respect to, or in response to this application by plaintiffs counsel." Pl.'s Opp. at 6. There is also no record of any further action taken by plaintiffs to complete the pre-trial order or establish a schedule for trial until plaintiffs' counsel "forwarded plaintiffs' portion of the Pretrial Order to the City so that it could be completed and filed with the Court" on Dec. 1, 2005. Pl.'s Opp. at 6 and Ex. J.

(3) Current Motion

To resume the current action, plaintiffs asked the City to complete the pre-trial order in a series of letters and telephone calls during December 2005 and January 2006. Pl.'s Opp. at 6. Plaintiffs state that "a supervisor

in the City's Law Department responded by informing plaintiffs' counsel that the City would not complete a pretrial order unless ordered to do so by the Court." Id. Plaintiffs then requested, and were granted by Magistrate Judge Mann on May 5, 2006, an order instructing the parties to complete the pre-trial order.

The parties to this action held a status conference on June 13, 2006. In light of the death of Officer Rivera, the parties were asked to submit letters to the Court regarding the City's possible indemnification of Officer Rivera, or possible liability for Rivera's actions. See DE 205, 207 & 208. Following a subsequent status conference held on July 31, 2006, the City filed the current motion to dismiss this action based on the plaintiffs' failure to prosecute.

Discussion

Under Federal Rule of Civil Procedure 41(b), a defendant may move to dismiss an action "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court." Fed. R. Civ. P. 41(b). The Second Circuit has set forth a five-factor test to guide a trial court's exercise of its discretion over a Rule 41(b) motion to dismiss. See *United States ex rel. Drake v. Norden Systems, Inc.*, 375 F.3d 248, 254 (2d Cir. 2004). This test requires consideration of (1) whether the failures to prosecute caused a delay of significant duration; (2) whether the plaintiff was given notice that further delay would result in dismissal; (3) whether the defendant was likely to be prejudiced by further delay; (4) the need to alleviate court calender congestions balanced against plaintiff's right to an opportunity for a day in court; and (5) whether lesser sanctions would be

a more appropriate remedy than dismissal. See *Dosunmu v. United States*, 361 F. Supp. 2d 93, 100 (E.D.N.Y. 2005) (applying Second Circuit five-factor test).

Dismissal for failure to prosecute is a harsh sanction that is "reserved for use only in the most extreme circumstances." *Norden Systems*, 375 F.3d at 251. But this sanction is appropriate here. The plaintiffs' significant delay weighs overwhelmingly in favor of granting this motion to dismiss. And although the other factors may not weigh as strongly against the plaintiffs, there are no factors to mitigate that delay or the prejudice resulting to the defendant.

In addition, "it is entirely proper for the judge to consider the likely merits of the suit in deciding whether to dismiss it for failure to prosecute." *Dosunmu*, 361 F. Supp. 2d at 99 (quoting *Ball v. City of Chicago*, 2 F.3d 752, 759 (7th Cir. 1993)). The plaintiffs litigated this suit for over five years before it was interrupted by the bankruptcy stay. During that time, the plaintiffs failed to provide any credible evidence to question the conclusions of the District Attorney's report exonerating defendant Rivera. [2] Under the circumstances, there is no reason to prolong this case any further.

Based on a consideration of all of these factors, this motion to dismiss will be granted in its entirety.

(1) Plaintiffs' Failure to Prosecute Caused a Delay of Excessive Duration

The City properly maintains that plaintiffs' delay of over four years, from the lifting of the bankruptcy stay of this suit in 2001 until plaintiffs' communication with the City regarding the pre-trial order in December 2005, is excessive. See Def.'s Mem. at 5. There is no evidence of any effort by plaintiffs to prosecute this lawsuit between July 2001, when plaintiffs requested a trial schedule from Magistrate Judge Mann, and December 1, 2005, when plaintiffs sent their portion of a joint pre-trial order to defendants. Plaintiffs had an obligation to pursue this litigation after they successfully moved to have the stay lifted. Their failure to do so for over four years constitutes grounds for dismissal. See *Shannon v. General Electric Co.*, 186 F.3d 186, 194 (2d Cir. 1999) (dismissal for failure to prosecute after delay of nearly two years).

Plaintiffs counter that they could not pursue this civil suit while they contested the dischargeability of defendant Rivera's debt in bankruptcy court between 1999 and 2004. See Pl.'s Opp. at 6. This argument is unavailing. The plaintiffs could resume litigating this section 1983 action once the bankruptcy stay was lifted on May 18, 2000. Plaintiffs were required to attend to this suit after it was reopened on April 23, 2001. Although the dischargeability of defendant Rivera's debt might be relevant to the financial reward plaintiffs hoped to receive from this lawsuit, plaintiffs' prosecution of this action was in no way contingent on the bankruptcy court's treatment of Rivera's Chapter 7 petition. The fact that plaintiffs were busy with the issue of Rivera's dischargeability in Bankruptcy Court does not excuse their failure to prosecute this case at the same time.

Even assuming arguendo that plaintiffs were correct in their belief that they were required to resolve the dischargeability issue before resuming this Section 1983 suit, the record shows that plaintiffs still failed to litigate the bankruptcy proceeding in a timely fashion. First, plaintiffs should have concluded their adversary proceeding against Rivera shortly after the bankruptcy court granted plaintiffs' motion for default judgment on December 11, 2001. The subsequent two-and-a-half years of delay resulted because of the failure of plaintiffs' counsel to follow the instruction of the bankruptcy judge to settle an order. [3] The inability of plaintiffs to follow procedural requirements does not excuse such a lengthy delay.

Second, plaintiffs have offered no evidence to explain the delay between Judge Eisenberg's April 1, 2002 order dismissing plaintiffs' motion for default judgment and the August 27, 2003 scheduling of a new pre-trial conference in that action. If plaintiffs truly believed that they were required to resolve the dischargeability action, then they also had an obligation to pursue that action in a timely manner. See *Madison-Onondaga Corp. v. Kanaley*, 241 B.R. 795 (Bankr. S.D.N.Y. 1999) (dismissing bankruptcy court adversary proceeding sua sponte for failure to prosecute).

Moreover, plaintiffs have also offered no explanation at all for their failure to act on this case between April 13, 2004, when the bankruptcy court issued the dischargeability order sought by plaintiffs, and December 1, 2005, when plaintiffs resumed contact with the City. See Pl.'s Opp. Ex. J. Even forgiving the plaintiffs' delays in bankruptcy court, they were required to resume this civil suit promptly after the

bankruptcy proceedings were closed. This unexplained delay of nineteen-and-a-half months remains an adequate basis for dismissal. [4]

(2) Plaintiffs' Delay Prejudiced Defendants

Prejudice resulting from unreasonable delay may be presumed as a matter of law. See *Peart v. City of New York*, 992 F.2d 458, 462 (2d Cir. 1993); *Dosunmu*, 361 F. Supp. 2d at 100. Therefore, the defendant is entitled to a presumption of prejudice based on plaintiffs' delays.

In addition, the City has offered specific facts to support its claim of prejudice. Plaintiffs' delay in prosecuting this case has compounded the difficulties that have inevitably arisen due to the death of Officer Rivera on or about August 19, 2000. For example, the City states that its current attorneys had no personal contact with defendant Rivera, whereas "[f]ive years ago, defendant Rivera had recently passed away and the attorneys assigned to the matter . . . had personally spoken with him." Def.'s Mem. at 6-7.

The City also initially asserted that it was unable to contact one of its key witnesses, Sergeant Gary Weisbecker, the retired NYPD internal affairs officer responsible for the Police Department's initial investigation into the allegations against defendant Rivera. Id. At 8. It appears that the plaintiffs have in fact been able to locate this witness. Pl.'s Opp. at 3. Nonetheless, the City is correct to argue that the retirement of Sergeant Weisbecker, as well as the inevitable worsening of his memory in the twelve years since his initial investigation, is enough to show some prejudice to the City. See Defendant City's Reply

Memorandum of Law in Further Support of its Motion to Dismiss ("Def.'s Reply") at 4. Similarly, the City raises a valid presumption that its other key witness, the sexual assault expert Dr. Eileen Tracey, would be less able to testify about her evaluation of this case after the passage of so many years. See Def.'s Mem. at 9-10.

In short, it is presumably more difficult, as a result of plaintiffs' delays, for the City to present competent testimony to support its assertions that the plaintiffs' allegations against defendant Rivera are baseless. See *Shannon*, 186 F.3d at 195 (finding presumption of prejudice because events at issue in lawsuit had taken place over a decade earlier, so "the likelihood that evidence in support of . . . defendants' position had become unavailable and that their witnesses' recollection had diminished was quite large"); *Peart*, 992 F.2d at 462 (citing potential for witness recollection to diminish or witness unavailability as the reason for a presumption of prejudice due to unreasonable delay); *Dodson v. Runyon*, 957 F. Supp. 465, 470 (S.D.N.Y. 1997) (dismissal appropriate after plaintiff's five-year delay; court can presume that witnesses' "memories have faded" when eleven years have passed since the events giving rise to plaintiff's cause of action). The City reasonably states that it "was more prepared to present this case to a jury five years ago, as opposed to today." Def.'s Mem. at 6. Therefore, the factor of prejudice also weighs in favor of dismissal.

(3) Additional Factors Weighing in Favor of Dismissal

Plaintiffs have been represented by counsel throughout this lawsuit. Although there was a change in counsel in

October 1997, see DE 176, the current counsel has been in place throughout the procedural history discussed here. No reasonable counsel could expect that the lengthy abandonment of this case would not implicate the failure to prosecute provisions of Rule 41(b). The presence of counsel throughout this delay encourages a reasonable presumption that plaintiffs were aware that dismissal is proper under such circumstances. See *Dosunmu*, 361 F. Supp. 2d at 101.

Finally, as noted above, the available evidence in this case weighs strongly against the plaintiffs' allegations. Plaintiffs have had sufficient time and opportunity to pursue these claims already, and under the circumstances it is fair and reasonable to dismiss this case so that the court can turn its attention to other matters on a congested docket. There is no need for lesser sanctions. Based on a review of "the record as a whole," *Norden*, 375 F. 3d at 254, dismissal is warranted.

Conclusion

For the reasons cited here, defendant's motion to dismiss is granted. The Clerk of the Court is directed to close the case.

Dated: Brooklyn, New York

September 18, 2007

SO ORDERED:

David G. Trager

United States District Judge

Footnotes

1 Defendant Reggie Rivera ("Rivera") passed away on August 18, 2000. See Docket Entry ("DE") 199. The City brings this motion alone, but has stated that its arguments for dismissal would apply equally to defendant Rivera's estate if it was substituted for defendant Rivera in this action. See Defendant City's Memorandum of Law in Support of its Motion to Dismiss, dated Sept. 11, 2006 ("Def.'s Mem.") at 1.

2 In fact, the testimony of one of plaintiffs' witnesses at an early hearing on this case lacked credibility, and appeared to be an attempt to manufacture evidence and present false testimony. See Hr'g Tr. 59-60, Apr. 7, 1995 (referencing plaintiffs' "misconduct" at earlier hearing); Hr'g Tr. 22-23, Dec. 27, 1994 (referencing lack of credibility of plaintiffs' witness).

3 Plaintiffs' counsel appears to misconstrue the basis for the Bankruptcy Court's dismissal of plaintiffs' motion for default judgment. This dismissal occurred after plaintiffs' failure to settle an order, and after notice from the court, and not simply because "the Bankruptcy Court administratively reopened the Bankruptcy matter with respect to the issue of the non-discharged status of Rivera." Pl.'s Opp. at 6.

4 As noted above, the City has argued for a full dismissal of this case against both defendants. Plaintiffs clearly failed to prosecute this case against the City for over four years. Even if defendant Rivera (or his

estate), as a party to the ongoing bankruptcy action, was aware of plaintiffs actions in bankruptcy court, the plaintiffs still have no excuse for failing to resume this suit against Rivera after the stay was lifted in 2001. At the very least, the nineteen-and-a-half month delay after the end of plaintiffs' bankruptcy action against Rivera provides grounds for dismissal.

Civil Action No. CV-94-0404 (DGT)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

DESSIE WUBAYEH, DEGETNU T. SHIMEKACH, FRANCIS EFAGENE, SYLVESTER SUBERRO, VERNON RICHARDS, MELAKU ASAMAW, OWEN GARRISON and CLETUS AMAGWU,
Plaintiffs,

-against-

THE CITY OF NEW YORK and REGGIE RIVERA,
Defendants.

MEMORANDUM AND ORDER

Trager, J:

As explained more fully in the September 18, 2007 Memorandum. and Order. dismissing this case, plaintiffs' delays in prosecuting this case have been both "lengthy and inexcusable." See United States ex rel. Drake y. Norden Systems, Inc., 375 F.3d 248, 256 (2d Cir. 2004)A presumption of prejudice is granted under such circumstances. In addition, the defendant has provided evidence of actual prejudice. None of the explanations offered by plaintiffs, counsel in the September 28, 2007 Motion for Reconsideration mitigate that prejudice, or provide an acceptable excuse for plaintiffs' repeated failures to move this case forward.

Plaintiffs, motion for reconsideration is therefore denied.

Dated: October 3, 2007

6/1/2009

No. 07-4413-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dessie Wubayeh, Degetnu T. Shimekach, Francis Efagene, Sylvester Suberro, Melaku Asmamaw, Vernon Richards, Owen Garrison and Cletus Amagwu,
Plaintiffs-Appellants,

v.

The City of New York and Reggie Rivera,
Defendants-Appellees.

ORDER

Appellants, Dessie Wubayeh, Degetnu T. Shimekach, Francis Efagene, Sylvester Suberro, Melaku Asmamaw, Vernon Richards, Owen Garrison and Cletus Amagwu, having filed a petition for panel rehearing, or , in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

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(2)

No. 09-261

Supreme Court, U.S.
FILED
SEP 30 2009
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

DESSIE WUBAYEH, DEGETNU T. SHIMEKACH, FRANCIS EFAGENE, SYLVESTER SUBERRO, MELAKU ASMAMAW, VERNON RICHARDS, OWEN GARRISON AND CLETUS AMAGWU,

Petitioners,

-v.-

THE CITY OF NEW YORK and REGGIE RIVERA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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October 1, 2009

QUESTION PRESENTED

Did the Circuit Court of Appeals correctly affirm the District Court's dismissal of the complaint under Rule 41(b) for failure to prosecute where the petitioners abandoned the action for four and one half years?

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No. 09-261

IN THE SUPREME COURT OF THE UNITED STATES

DESSIE WUBAYEH, DEGETNU T. SHIMEKACH, FRANCIS EFAGENE, SYLVESTER SUBERRO, MELAKU ASMAMAW, VERNON RICHARDS, OWEN GARRISON, AND CLETUS AMAGWU,

Petitioners,

-v.-

THE CITY OF NEW YORK and REGGIE RIVERA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

COUNTER-STATEMENT OF THE CASE

Petitioners Dessie Wubayeh, Degetnu T. Shimekach, Francis Efagene, Sylvester Suberro, Vernon Richards, Melaku Asmamaw, Owen Garrison, and Cletus Amagwu ("petitioners"), appeal from a final order, dated September 18, 2007, which granted the motion of respondents, the City of New York ("the City," or collectively with the late defendant Reggie Rivera, "respondents"),

for dismissal of the action for failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure ("FRCP"). The United States Court for the Eastern District of New York (Trager, J.), held that petitioners' delay of over four years in pursuing the litigation was excessive and constituted grounds for dismissal, and dismissed the action as to the City and *sua sponte* as to the late Reggie Rivera, and the Court of Appeals for the Second Circuit affirmed.

Respondents request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's April 8, 2009 summary order in this case. The order below does not conflict with a decision of this Court or another court of appeals on any question petitioners attempt to formulate. Nor does the petition otherwise properly raise any other issue calling for this Court's exercise of its supervisory power.

Background

Petitioners are seven male livery cab drivers and the wife of one driver, who brought this action against the City and Reggie Rivera, a New York City police officer, now deceased, under 42 USC §1983, alleging that P.O. Rivera had committed violent sexual assault (forcible anal sodomy) or attempted sodomy, against each of the drivers while on duty and in uniform as a police officer, in Far Rockaway, Queens, on November 24, 1992; January 9 and January 28, 1993; an unspecified date in March or April, 1993; April 30, 1993, and November 7 or 14, 1993. On April 14, 1993, the first alleged victim filed a complaint with the Civilian Complaint Review Board ("CCRB")

alleging a sexual assault by P.O. Rivera three months earlier, followed by similar complaints lodged by the other six petitioners.

The Queens County District Attorney's Investigation

In response to these claims, the Queens District Attorney launched a lengthy investigation, which was completed on December 15, 1994. The 146-page report of the investigation consisted of extensive interviews with the alleged victims and their alleged witnesses as well as many other investigative procedures:

> In view of the seriousness of the charges, the investigation into the allegations has been extraordinarily painstaking and thorough and comprehensive in scope. The investigative steps have basically involved a twofold process: (1) inquiry into the allegation; and, (2) inquiry into Officer Rivera's whereabouts and his official duties on the dates in question. Each step was complicated, among other things, by the delay in the reporting of the allegations and the vagueness of times of the alleged attacks.
>
> A multitude of investigative techniques were utilized. They included personal interview, record reviews, DMV searches, surveillance, crime scene searches, canvassing for witnesses, use of expert consultants, random interviews and scientific testing.

In its conclusions, the Report summarized all the factors set forth above, concluding that there was absolutely no credible evidence to support the claims of the alleged victims. The Report also noted that there was considerable animosity between the group of illegal van drivers and P.O. Rivera, that was first manifested in the meeting organized by Wubayeh in August, 1992. At that meeting, Wubayeh urged drivers who had been ticketed or arrested by P.O. Rivera to file complaints against him. Several drivers did so, using fictitious names, addresses and telephone numbers. Thus, the Report concluded that Wubayeh had an inclination to file reports against P.O. Rivera long before he filed his first allegation of sexual assault on April 14, 1993. In addition, every one of the other alleged victims spoke to Wubayeh prior to going to anyone in law enforcement, as each of them admitted to Ms. Treacy and to the investigative team. This factor, known as "contamination," cast considerable doubt on the credibility of the alleged victims' accusations.

The Report also concluded that the investigation of P.O. Rivera's work showed that he could not possibly have been committing these sodomies during the times when there was documentary evidence that he was actually performing his daily work of either ticketing illegally parked vehicles or doing desk work. Furthermore, his profile was completely inconsistent with that of a serial sex offender, and he fully cooperated with the investigation, voluntarily submitting to various tests which he had no legal obligation to take.

The Report summarized the many instances of inherently incredible details in the claims of the alleged victims, including refusal to give their real names, changing their stories, inability to remember when the alleged attack occurred, unexplained inconsistencies in regard to the vans and to other details of their stories, unsubstantiated claims that eyewitnesses existed, and refusal of some of the alleged victims to admit that they knew the other alleged victims.

Litigation History

1. The Summons and Complaint

The Summons and Second Amended Complaint were filed on April 19, 1995. Petitioners brought this action pursuant to 42 U.S.C. § 1983, alleging that the City and P.O. Reggie Rivera violated their civil rights when defendant Rivera allegedly sexually assaulted petitioners while acting under color of state law. Petitioners alleged forty-one causes of action based on six instances of forcible sodomy, and one incident of sexual "groping" (Cletus Amagwu), committed by P.O. Rivera while on duty and in uniform as a police officer. In addition to the seven van drivers named in the caption, Wubayeh's wife, Degetnu T. Shimekach, sued for loss of consortium.

Defendants filed their Answer on June 5, 1993, denying the material allegations of the complaint.

2. The Bankruptcy Proceedings

On September 21, 1999, the litigation was stayed pending the resolution of a bankruptcy

proceeding brought by defendant Rivera. Following the lifting of the stay in May, 2000, at petitioners' request, the District Court reopened this action on April 23, 2001. There were no further proceedings until May 4, 2006, when petitioners requested and received an order from the District Court setting a schedule for the parties to file a Joint Pre-Trial Order. Shortly thereafter, on May 17, 2006, defendants' attorney, the New York City Corporation Counsel, learned that P.O. Rivera had died on August 19, 2000.

3. The Motion to Dismiss

On September 11, 2006, the City served its motion to dismiss for failure to prosecute, supported by a declaration of counsel, memorandum of law, the Queens DA's Report, and other documents. After briefly reviewing the facts of the case, the City argued that petitioners had effectively abandoned their case from 2001 until late 2005, and that the five factors to be considered in determining whether to dismiss a case for failure to prosecute, weighed in favor of dismissal: (1) the duration of petitioner's failure; (2) whether petitioner had received notice that further delay would result in dismissal; (3) whether defendant would be prejudiced by further delay; (4) the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard; and (5) the efficacy of lesser sanctions.

The City argued that the duration of petitioners' failure here was unusually long and well beyond the time lapse held in several cases to be unacceptable, citing cases where the action was

dismissed for failure to prosecute for periods of as little as four months, five months, six months, eight months, or ten months. As to notice, respondent argued that petitioners were represented by counsel at all times who were presumed to be familiar with FRCP 41(b). Respondent also cited the actual prejudice to their case, insofar as P.O. Rivera had died, the attorneys who had been assigned to this case originally and had personally interviewed P.O. Rivera, had gone, and other witnesses had retired from the police force and had not been located.

Respondent also argued that petitioners' failure to move the case along was related to the obvious lack of merit in petitioners' case, as shown by the results of the District Attorney's investigation and report. Thus, this case fit neatly into the category of cases where the Court's interest in moving cases forward outweighed petitioners' right to go to trial (A327). As to lesser sanctions, respondent argued that the prejudice it suffered as a result of the unconscionable delay militated against anything but dismissal.

Petitioners served a response to the City's motion on October 30, 2006. Supporting the motion was a declaration of counsel, a memorandum of law as well as numerous other documents, including an undated, unsigned 125-page critique of the DA's Report. Petitioners argued that respondent was not prejudiced by the delay, and that the witnesses could be located and subpoenaed. Petitioners further argued that P.O. Rivera's bankruptcy proceedings had halted the action because even though the stay on the matter herein was lifted in 2000, petitioners were required to attend the

bankruptcy proceedings in 2002, 2003 and 2004 in order to obtain a ruling as to the dischargeability of any award petitioners might obtain in this matter. Petitioners claimed that after obtaining such ruling from the bankruptcy court, they then reopened this case.

Additionally, petitioners argued that they had received no warning notice from the Court regarding the possibility of dismissal for failure to prosecute, and that respondents had done nothing to advance the case over the years, and that dismissal was a draconian sanction which would deny petitioners their day in court.

Respondent submitted a reply memorandum of law on October 30, 2006.

The District Court's Order

The memorandum and order of the United States Court for the Eastern District of New York (Trager, U.S.D.J.), granting respondents' motion for dismissal was entered on September 18, 2007 (Petition 5a-19a). The Court reviewed the procedural history of the case, which began with the filing of the initial sealed complaint on January 28, 1994 (Pet. 6a). The Court noted that the Queens County District Attorney conducted an extensive investigation, culminating in its December 15, 1994 Report that concluded there was no credible evidence to support the petitioners' allegations (Pet. 6a). The Court quoted the Report's further conclusion that petitioners, who were employed in the illegal livery van business, had a motive to bring down P.O. Rivera, who had "played an active and aggressive role in the police

crackdown on this illegal industry" by issuing thousands of summonses, seizing vans, and making arrests (Pet. 7a). This factor raised "the specter of fabrication" in this case (Pet. 7a).

The District Court then noted that the proceedings had halted when P.O. Rivera filed for bankruptcy, but that the stay on the litigation herein had been lifted on May 18, 2000. Eight months later, on February 21, 2001, petitioners requested the Court to reopen the case, which was granted on April 23, 2001. After requesting a trial schedule on June 29, 2001, petitioners fell silent until December 1, 2005, when petitioners' counsel forwarded its portion of the Pretrial Order to the City for completion and filing (Pet. 10a).

Holding that "[petitioners'] significant delay weighs overwhelmingly in favor of granting this motion to dismiss," the Court also held that during the five years preceding the bankruptcy stay, petitioners had not provided any credible evidence to refute the DA's Report exonerating P.O. Rivera (Pet. 12a-13a).

Analyzing the various aspects of petitioners' nearly four-and-one-half year delay, the Court noted that as soon as the bankruptcy stay was lifted, petitioners could have resumed the proceedings herein, even while continuing to pursue their claims in bankruptcy court (Pet. 13a). Indeed, the Court pointed out that the two-and-one-half year delay in bankruptcy court as to the issue of dischargeability was actually occasioned by petitioners' failure to follow the bankruptcy judge's instruction to settle an order after that court granted petitioners' motion for default judgment

(Pet. 14a). The Court also found that petitioners had not explained the sixteen-month delay between the bankruptcy court's dismissal of petitioners' motion for default judgment and the August 27, 2003 scheduling of a new pre-trial conference in that court (Pet. 14a). Finally, the Court also noted that petitioners had failed to explain their nineteen-month failure to act on the case herein following the dischargeability order issued by the bankruptcy court, a lengthy enough delay in itself to justify dismissal for failure to prosecute (Pet. 14a-15a).

The District Court also found that the delay herein prejudiced respondent, who had reasonably claimed to have been "more prepared to present this case to a jury five years ago, as opposed to today" (Pet. 15a).

In regard to the fact that petitioners had not been warned that dismissal was a possibility, the Court noted that petitioners were at all times represented by counsel, who could not reasonably expect that such a "lengthy abandonment" would not risk dismissal under Rule 41(b) (Pet. 16a-17a). Finally, the Court found there was no need for lesser sanctions where other, more pressing matters demanded the Court's attention, and petitioners had had sufficient time and opportunity to pursue claims that were unsupported by the available evidence (Pet. 17a).

The Order of the Circuit Court of Appeals

In an opinion issued on April 8, 2009, the United States Court of Appeals for the Second Circuit affirmed the District Court's order (Pet. 2a).

Citing United States ex rel Drake v. Norden Sys., Inc., 375 F3d 248 (2d Cir. 2004), the Court enumerated the five criteria to be considered (Pet. 2a):

> whether (1) the plaintiffs' failure to prosecute caused a delay of significant duration; (2) the plaintiffs were given notice that further delay would result in dismissal; (3) the defendants were likely to be prejudiced by further delay; (4) the district court carefully balanced the need to alleviate court calendar congestion against the plaintiffs' right to an opportunity for a day in court, and (5) the district court adequately assessed the efficacy of lesser sanctions.

Reviewing the District Court's decision for abuse of discretion, the Court found that there was no clear error in the District Court's emphasis on the petitioners' unreasonable delay and the resulting prejudice to the City (Pet. 2a). The Circuit Court found that the District Court did not err in finding that petitioners delayed over four years in taking any action in this lawsuit (Pet. 3a). The Court also found no clear error in the District Court's conclusion that the many delays in the bankruptcy proceedings themselves were petitioners' own fault (Pet. 3a).

The Circuit Court held that the District Court was within its discretion in holding that the prejudice resulting from the extremely long delay could be "presumed as a matter of law" (Pet. 3a). The Court concluded that the wide latitude accorded the District Court in deciding such a

motion permitted the District Court to base its conclusions on the long period of delay and prejudice to the City, regardless of petitioners' alleged diligence at the time of the dismissal or petitioners' lack of notice in regard to the four and one half years' delay (Pet 3a-4a).

REASON FOR DENYING THE PETITION

THE SECOND CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S ORDER AND JUDGMENT IS LEGALLY CORRECT AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, ANOTHER COURT OF APPEALS OR OTHERWISE WARRANT FURTHER REVIEW BY THIS COURT.

Contrary to the argument of petitioners herein, there is no conflict among the Circuit Courts of Appeals in their treatment of motions to dismiss under Rule 41(b). The discretionary standard is virtually the same in all the Circuits, and the criteria for dismissal are quite similar.

In all Circuits, a dismissal for failure to prosecute is based on the record as a whole and on the totality of the circumstances, which vary enormously according to the complexity of the litigation, the presence or absence of attorneys, and the nature of the delays.

For example, both the Second Circuit and the Ninth Circuit have cited very similar criteria. In the Second Circuit, the Court looks to (1) the length of the delay; (2) whether notice of a possible dismissal was given to plaintiff; (3) whether further

delay would prejudice defendant; (4) the need for calendar control in light of plaintiff's right to be heard; (5) the efficacy of lesser sanctions. See Peart v. New York, 992 F.2d 458 (2d Cir. 1993).

The Ninth Circuit's criteria are "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions." Moneymaker v. CoBen (In re Eisen), 31 F.3d 1447, 1451 (9th Cir. 1994).

These factors are also considered by virtually every other Circuit, in varying degrees of importance, as will be seen by our discussion below. Some Circuits may place more emphasis on one factor over another based on the circumstances in a particular case, but no one factor is the sole consideration in any case, and every case depends heavily on the factual and procedural history of the litigation.

1. A Clear Record of Delay Or Contumacious Conduct

Petitioners claim that there are marked differences in the way the Circuits other than the Second Circuit address the issue of contumacious conduct (Pet. 10-13). However, petitioners misstate the rule in order to shift attention from the true problem with their case, that of the "clear record of delay."

Virtually all the Circuits restrict Rule 41(b) dismissals to cases where there was either a clear

record of delay or contumacious conduct. In Stearman v. Comm'r, 436 F.3d 533, 535 (5th Cir.), cert. denied, 547 U.S. 1207 (2006), a case involving extreme contumacy by the plaintiff, the Court held:

> Dismissals with prejudice for failure to prosecute are proper only where (1) there is a clear record of delay or contumacious conduct by the plaintiff and (2) the district court has expressly determined that lesser sanctions would not prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile (emphasis added).
>
> In most cases, a plain record of delay or contumacious conduct is found if one of the three aggravating factors is also present: (1) delay caused by the plaintiff; (2) actual prejudice to the defendant; or (3) delay as a result of intentional conduct (emphasis added).

Here, of course, there was a clear record of delay, and actual prejudice to the respondent. In the other Fifth Circuit case cited by petitioners, John v. Louisiana, 828 F.2d 1129, 1131 (5th Cir. 1987), there was neither a clear record of delay or contumacy. The Circuit Court reversed the dismissal for failure to prosecute where the delay amounted to only "a few months aggregate delay," caused by plaintiff's attorney's "ineptitude and procrastination," and found that the longer delays in the case were the result of the District Court's own errors.

In this case, the delays cited by the District Court were due entirely to petitioners' abandonment of the case during the years when they were litigating in the Bankruptcy Court. The Court noted that the delay was altogether unnecessary, as the stay on the District Court action had been lifted in May, 2000, and that action had been reopened in April, 2001.

Petitioners also cite cases from several other Circuit Courts regarding contumacious conduct, but none of the cases cited support their theory of a deep chasm between the Second Circuit and the others. Starting with Herbert v. Saffell, 877 F.2d 267 (4th Cir. 1989), a case where the delay caused by the plaintiffs was minor, and consisted only of failing to file timely status reports regarding their efforts to find an alternative sewage disposal system for the property in question, the District Court's dismissal was found to be an abuse of discretion. The "lackadaisical" behavior of counsel did not either prolong the litigation, or prejudice the defendants. Unlike the situation herein, there was no "drawn out history of deliberately proceeding in a dilatory fashion" (Herbert, supra at 270).

In Lowe v. East Chicago, 897 F.2d 272, 274 (7th Cir. 1990), the case was only one year old when the District Court dismissed it for failure to prosecute because the plaintiff was unable to go to trial without his expert witness who had become unavailable due to the Court's last minute rescheduling. In reversing, the Circuit Court held that a less severe penalty than dismissal should be considered unless "there exists a clear record of

delay or contumacious conduct . . ." (emphasis added).

Cohen v. Carnival Cruise Lines, Inc., 782 F.2d 923, 925 (11th Cir. 1986), held that the dismissal for failure to prosecute was an abuse of discretion where the case was dismissed after only three months, and there was an "absence of clear delay or willful contempt."

Similarly, in Mulbah v. Detroit Bd. of Educ., 261 F.3d 586, 591 (6th Cir. 2001), the Court listed the four factors to be considered in determining whether a dismissal for failure to prosecute should be upheld, and stated,

> While none of these factors is dispositive, a case may be dismissed by a district court where there is a clear record of delay or contumacious conduct on the part of the plaintiff (emphasis added).

In that case, the Sixth Circuit reversed the District Court's *sua sponte* dismissal after only eleven months from the date of the filing of the complaint, holding "there was no significant delay," and no prejudice whatever to the defendant.

Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 868 (3d Cir. 1984), affirmed the District Court's dismissal, nine months after filing, noting that "this litigation has been characterized by a consistent delay by plaintiffs' counsel." The Court also noted, contrary to the District Court's finding, that despite counsel's dilatoriness, there was a complete absence of contumacious behavior.

Again, this is similar to the finding of the Court herein, which did not find any contumacy on petitioners' part, nor did the City argue that petitioners' actions were contumacious or in bad faith.

In contrast, Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co., 497 F.3d 1135 (10th Cir. 2007), hinged largely on the bad faith actions of plaintiffs, who withheld their principal from deposition, despite his advanced age and ill health, with the result that his death occurred before he could be deposed. Although bad faith was the primary finding of the District and the Circuit Court, the decision listed the other factors which they normally considered regarding a Rule 41(b) dismissal (Ecclesiastes, supra at 1143):

> (1) the degree of actual prejudice to the other party; (2) the amount of interference with the judicial process; (3) the litigant's culpability; (4) whether the court warned the party in advance that dismissal would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions.

Again, this list is virtually identical to the factors considered by the Second Circuit in the matter herein. Thus, although the cases cited by petitioners illustrate various reasons for dismissal under Rule 41(b), none of them hold that a clear record of delay is an insufficient basis for dismissal.

2. Petitioners' Display of Diligence

Petitioners cite a complex class action case; Marks v. San Francisco Real Estate Bd., 627 F.2d 947 (9th Cir. 1980), for the proposition that delay in the past can be excused by recent diligence. In that case, the only delay that could be blamed on the plaintiff was the two and a half years during which he was compiling his list of members of the class action. Thereafter, he encountered several setbacks in decisions from the District Court and the Circuit Court of Appeals, all of which were reversed in the cited decision, noting that he was "assiduous in his prosecution of this action." Marks, supra at 948.

In contrast, petitioners herein were not assiduous in their prosecution, because not only did they (1) forget about it during the several years in bankruptcy court, despite the fact that the stay on the action herein had been lifted in 2000, but (2) both the District Court and the Circuit Court found that they were far from assiduous in the bankruptcy action as well (Pet. 3a, 14a).[1]

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[1] Petitioners' attorney now also claims that he required shoulder surgery in 2004 and back surgery in 2006 (Pet. 4). As he did not bring this to the District Court's attention at any time during the litigation, (until his motion for reconsideration), and failed to mention it in his opposition to defendant's motion to dismiss, the Circuit Court appropriately ignored it, as this Court is free to do. See Singleton v. Wulff, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). Accord Leyda v. Alliedsignal, Inc., 322 F.3d 199, 207 (2d Cir. 2003), ("We normally will not reverse a judgment on the basis of an argument that was not made to the district court."); See also Shuaib v. New York City Hous.

Petitioners also cite GCIU Employer Retirement Fund v. Chicago Tribune Co., 8 F.3d 1195 (7th Cir. 1993), for the same proposition, and again, the holding in that case does not conflict with the Second Circuit's decision herein. In GCIU, the delay in the prosecution was for twenty-two months while the parties were engaged in settlement negotiations, and failed to keep the District Court informed. Here, however, petitioners were silent for nearly four and a half years, and were not even diligent in handling their role as an interested party in the bankruptcy action, where the Court found they had caused extensive delays, or in the months following the resolution of that action. The diligence that petitioners claim herein is not comparable to the diligence in the cases cited, where years of complex, vigorously prosecuted litigation more than made up for the periods of apparent inaction.

These two cases do not establish a standard which sets these two Circuits apart from the other Circuits, including the Second Circuit, but rather illustrate the breadth of the Court's discretion in Rule 41(b) motions. Furthermore, petitioners' claim that the Circuit Court "explicitly stated that the Petitioner-Plaintiffs 'were displaying diligence at the time the district court dismissed their action,'" is inaccurate (Pet. 3a). The Circuit Court's decision described petitioners' own argument regarding their diligence, not the Court's assessment of it (Pet. 3a).

Auth. Constr. Dep't, 1998 U.S. App. LEXIS 1228 (2d Cir. 1998) (plaintiff's counsel's claim of serious illness insufficient to overturn District Court's dismissal for failure to prosecute).

3. The Issue of Notice

In Link v. Wabash R. Co., 370 U.S. 626 (1962), this Court held that Rule 41(b) permits a court to dismiss a case for failure to prosecute *sua sponte*, and that neither the absence of notice to the plaintiff, nor failure to hold a hearing on the issue, necessarily offends due process. The only Circuit cited by petitioners as having a strict rule about the necessity of giving notice to the plaintiff prior to dismissing under Rule 41(b) is the Seventh Circuit. However, as even petitioners concede, even the Seventh Circuit does not invariably require it, citing Gabriel v. Hamlin, 514 F.3d 734 (7th Cir. 2008). Another useful case in this regard is Fischer v. Cingular Wireless, LLC, 446 F.3d 663, 665 (7th Cir. 2006), where the Court noted that the requirement of notifying *pro se* litigants had been "softened" from a "must" to a "should" in several cases. In affirming the District Court's dismissal under Rule 41(b), the Court reasoned:

> Leaving the decision to the district courts ensures that dilatory tactics are sanctioned appropriately. The prejudice incurred by a delay in one case may far outweigh that caused in another. Were district courts required to warn litigants before dismissing a case, we would in effect be granting each litigant one opportunity to disregard the court's schedule without fear of penalty regardless of the harm done to other litigants. Such a rule would impermissibly burden the district courts in their efforts to manage their dockets.

Thus, petitioners' argument -- that the Second Circuit's standard for dismissal for failure to prosecute, absent a prior warning, is not followed in the Seventh Circuit -- is without merit. Furthermore, the Seventh Circuit in Fischer also cited cases from the Third, Eighth, and Tenth Circuits that explicitly hold that a warning prior to dismissal is not always required.

4. Delay Caused by Defendant

Contrary to petitioners' argument that the majority of the delay was caused by P.O. Rivera "suddenly" filing for bankruptcy and the automatic stay of the matter herein (Pet. 16), the District Court correctly pointed out that petitioners could have resumed prosecuting this matter as soon as the stay was lifted on May 18, 2000 (Pet. 13a). The Circuit Court agreed, and held that the District Court "did not clearly err in concluding that many of the delays before the bankruptcy court were the [petitioners'] own fault" (Pet. 3a). Petitioners' claim that the City never sought to intervene in the bankruptcy action (Pet. 16), is both misleading and irrelevant to the matter herein, because petitioners have never adequately explained why, once the stay was lifted in 2000, they could not attend to the bankruptcy court proceedings, while simultaneously continuing with this action. [2]

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[2] Petitioners also express indignation that the City did not inform them earlier of P.O. Rivera's death (Pet. 16). However, at the time of Rivera's death on May 18, 2000, petitioners, not the City, were in litigation with Rivera in bankruptcy court, whereas this case had been administratively closed eight months earlier, on September 21, 1999, due to the automatic stay of these proceedings when Rivera filed for bankruptcy.

Petitioners cite Markwell v. County of Bexar, 878 F.2d 899 (5th Cir. 1989), which concerned various matters, including the filing of a motion by defendant that was deemed to be a delay tactic. Here, on the contrary, only the petitioners characterized P.O. Rivera's bankruptcy action as a delay tactic. Also cited is United States v. Inter-American Shipping Corp., 455 F.2d 938, 940 (5th Cir. 1972), where a delay was caused by defendant's failure to serve an answer to the complaint, and the District Court dismissed the complaint without prejudice. The Circuit Court, in turn, vacated the dismissal, noting that a dismissal under Rule 41(b) "generally has been permitted only in the face of a clear record of delay or contumacious conduct by the plaintiff" (citations and interior quotation marks omitted).

As in the previous section, regarding notice, petitioners here only cite cases from one Circuit, and those cases are completely unrelated to the matter herein, nor do they suggest a significant division among the Circuits.

Finally, petitioners claim that only the Second Circuit uses a "wide latitude" standard in permitting the District Court's Rule 41(b) dismissal to stand. However, all the cases cited by petitioners, as noted above, demonstrate that "wide latitude" is an aspect of the judicial discretion, accorded to District Courts in managing their cases. Petitioners have not shown that any other

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Petitioners, thus, were surely in a better position, at the time, to be informed of Rivera's death.

Circuit employs "more stringent standards" than the Second Circuit.

Thus, for all the reasons set forth above, here, viewing the totality of the circumstances herein, where the delay caused by petitioners lasted nearly four and a half years and prejudiced respondents in their defense of the action, the decision of the Second Circuit, affirming the District Court's dismissal of this action under Rule 41(b), is not in conflict with those of the other Circuits (including the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh) under Rule 41(b).[3] In every Circuit, depending on the totality of the circumstances, a clear record of delay can be the basis for a dismissal for failure to prosecute. Therefore, as the decision herein is legally correct, and does not conflict with any decision of this Court or another Court of Appeals, it does not otherwise warrant further review by

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[3] See also Hodge v. American Home Assurance Co., 1994 U.S. App. LEXIS 12428 *5-*6 (1st Cir. 1994):

> Rule 41(b) of the Federal Rules of Civil Procedure expressly authorizes a district court to dismiss a case for failure of the plaintiff to prosecute or comply with . . . any order of court. Dismissal with prejudice is a harsh sanction, which should be employed only when a plaintiff's misconduct has been extreme, and only after the district court has determined that none of the lesser sanctions available to it would truly be appropriate. A finding of extreme misconduct is justified if there is extremely protracted inaction, disobedience of court orders, ignorance of warnings, contumacious conduct, or some other aggravating circumstance such as prejudice to the defendant, glaring weaknesses in the plaintiff's case, and the wasteful expenditure of a significant amount of the district court's time (internal citations and quotation marks omitted, emphasis added).

this Court. See Rule 10, Supreme Court of the United States Rules.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
October 1, 2009

Respectfully submitted,

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